

G. Investigations should begin to focus on the "Second Generation" issues in EEO Policy: treatment of minorities and women after they've been hired

The EEO Rule has been reasonably effective in promoting the recruitment of minorities and women -- although even this basic skill has not yet been learned by every broadcaster.^{393/} Yet there is much more to the employment process than showing up for an interview. The EEO Rule recognizes this by expecting a broadcaster to:

(b)(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(b)(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(b)(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(b)(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility....

^{393/} In 1994, the Commission found that "there continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry." (fn. omitted). EEO Report - 1994, 9 FCC Rcd at 6314-15.

(c)(3)(ii) Where there is underrepresentation of either minorities and/or women, examin[e] the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary....

(c)(5) Analyze its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program[.]

These issues -- the "Second Generation" of EEO enforcement -- are seldom addressed in the FCC's enforcement program.^{394/}

It is time to bring the fruits of equal opportunity to everyone in broadcasting, not just the unfortunate few who seek employment at the 2% or 3% of stations subject to Bilingual investigations for failure to recruit. An exclusive focus on the licensees who refuse even to recruit minorities and women omits those licensees who are careful to send job notices to minority and women's organizations, but who deliberately and discreetly fail to hire minorities and women in meaningful positions.^{395/}

^{394/} Top management will be the last stronghold of race and gender privilege. The President has observed that "in the nation's largest companies only six-tenths of one percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans, three-tenths of a percent by Asian Americans; women hold between three and five percent of these positions. White males make up 43 percent of our work force, but hold 95 percent of these jobs." Affirmative Action Address, p. 8. A review of the Group Ownership Section of Broadcasting Yearbook 1995, which lists approximately 700 American companies and over 1,000 broadcast executives, reveals approximately seven minority executives (CEO, COO) in nonminority owned companies. No more than 5-10% are women. This is apparent to every FCC commissioner who has ever addressed a meeting of the NAB or a state broadcaster's association.

^{395/} For example, in Columbus, 7 FCC Rcd at 6359 ¶25, a licensee was immunized from hearing even though it had hired no minority applicants. It was enough that the minorities applied: "although the licensee did not hire minorities during the time it was not subject to reporting conditions, its efforts attracted several minority applicants. We, therefore, find no evidence that the licensee engages in discrimination."

Second Generation EEO issues have been identified by the Federal Glass Ceiling Commission as including:

- Initial placement and clustering in relatively dead-end staff jobs or highly technical professional jobs
- Lack of mentoring
- Lack of management training
- Lack of opportunities for career development
- Lack of opportunities for training tailored to the individual
- Lack of rotation to line positions or job assignments that are revenue producing
- Little or no access to critical developmental assignments, including service on highly visible task forces and committees
- Different standards for performance evaluation
- Biased rating and testing systems
- Little or no access to informal networks of communication
- Counterproductive behavior and harassment by colleagues.

Glass Ceiling Environmental Scan, pp. 35-36 (identifying "[t]he major barriers identified by Commission research, CEO studies, and focus groups[.]"^{396/} The Glass Ceiling Commission found that the media industry had a special need for diversity initiatives:

^{396/} The Glass Ceiling Commission also determined that "the following characteristics are common to all successful glass ceiling initiatives:

- They have CEO support
- They are specific to the organization
- They are inclusive
- They address preconceptions and stereotypes

[n. 396 continued on p. 316]

Efforts to diversify television and newspaper newsrooms with minorities and women have yielded limited progress according to several recent surveys by the American Society of Newspaper Editors, the Radio and Television News Directors Foundation and Vernon Stone at the Missouri School of Journalism. Progress toward promoting minorities and women into decisionmaking positions was even less evident.

Glass Ceiling Recommendations, p. 47.

The Commission's first priority should be to shift its focus from low paying to high paying jobs. As we have shown, there is no longer a need for an EEO enforcement program aimed at "bottom five category" (secretarial and janitorial) jobs. See p. 38 supra. Indeed, the employment of minorities and women only in low level jobs may compel an inference of discrimination.^{397/} A regulatory focus on upper level jobs would more efficiently channel the Commission's resources toward encouraging the employment of persons who will be in a position to influence program diversity. See pp. 16-20 supra.

^{396/} [continued from p. 315]

- They emphasize accountability
- They track progress
- They are comprehensive."

Id. at 39.

^{397/} See, e.g., U.S. v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969).

Second, the Commission should announce that it will review issues of promotion and placement, starting with basic allegations of exclusion of minorities and women from entire job categories such as management^{398/} or sales.^{399/} It should overrule, as obsolete, cases holding that the Commission does not examine employment in particular job categories.^{400/}

Third, the Commission should renew the focus on training which began when it banned discrimination in broadcasting in 1968.^{401/}

^{398/} Largely-White sales forces are commonly employed as a leading source of the all-White word-of-mouth job referrals which so often become the enemy of EEO compliance. See, e.g., Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 724 (8th Cir.), cert. denied, 414 U.S. 854 (1973); cf. William H. Schuyler, 44 RR2d 559 (1978).

^{399/} For example, the Commission should establish a new zone of reasonableness test for management. See 283-287 supra.

^{400/} In the middle and late 1970's, the Commission began to take steps toward emphasizing the importance of equal opportunity in all types of jobs. See, e.g., Independence, 53 FCC2d at 1166 (licensee admonished when Blacks were steered only to positions at the Black formatted AM station in a duopoly); Carolina Radio of Durham, 74 FCC2d 571, 576 (1979) (emphasizing that minorities should not be "excluded from employment in any of the upper four job categories.") Unfortunately, this promising line of cases ended in the 1980's. See, e.g., BBC License Subsidiary, 10 FCC Rcd at 10975 ¶37 ("rather than examining each job category individually, [the Commission] evaluates a station's overall employment, including all upper-level job categories, in assessing a station's EEO performance"); WPIX, Inc., 5 FCC Rcd 7469, 7472 ¶17 (MMB 1990) (although no Hispanics were employed in sales or as officials and managers by a large New York City television station, the Commission limited its review only to the upper four job categories).

^{401/} Training has long been a primary instrument of the Commission's EEO regulatory program. Nondiscrimination - 1969, 18 FCC2d at 245.

Fourth, the Commission should begin to address issues of job quality, starting with the number one priority: sexual and racial harassment. They are endemic in broadcasting, especially radio.^{402/}

^{402/} In a landmark decision wherein it compared sexual harassment to racial harassment, the Supreme Court stated that Title VII provides employees with the "right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986) ("Vinson"). To be actionable, the harassment "must be sufficiently severe or pervasive to alter the conditions of the employee's working environment and create an abusive working environment." Id. at 60. The Supreme Court in Vinson went on to say that even if an individual employee was not personally the object of racial harassment, that employee might nevertheless have a Title VII claim if he or she were required to work in an atmosphere where such racial harassment was pervasive. Id. at 65-66 (quoting with approval Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). Employers should inform members of their staffs that the expression of racist or sexist attitudes in public is unacceptable "and a violation of Title VII." In that way, "Title VII may advance the goal of eliminating prejudices and biases in our society." Andrews v. City of Philadelphia, 897 F.2d at 1486 (quoting Davis v. Monsanto Chemical Co., 858 F.2d at 350 (citations omitted)). See also DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980).

Hostile environment allegations are very common in broadcasting. Sometimes these cases arise because producers of anti-woman or anti-minority talk shows behave in a manner consistent with the broadcasts, and fail to assure minority and female staff members that the program is an artistic product which, like theater, is not intended to reflect the station's judgment of the actors and stagehands as human beings. The use of racist or sexist material, irrespective of its appropriateness to be broadcast to the general public, can have an adverse impact on the employment opportunities of the people forced to help produce and distribute it. See, e.g., Award of Arbitrator, Case No. 55-300-0064-88, November 16, 1988, at 12, cited in EZ Communications, Inc., 8 FCC Rcd 2448, 2449 n. 5 (MMB 1993); see also Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272-73 (7th Cir. 1991) (racial slurs, even if not directed at the plaintiff, can still create a hostile racial environment).

In the only reported FCC sexual harassment case, a construction permit applicant was disqualified for failing to report an adverse court determination in a sexual harassment case but the Review Board did not reach the question of whether the sexual harassment itself was disqualifying. Atlantic City, 6 FCC Rcd at 927 ¶¶12-14.

Fifth, the Commission should be receptive to consideration of the quality of the working environment -- work assignments and conditions,^{403/} compensation,^{404/} opportunities for promotion,^{405/} retention^{406/} and termination.^{407/}

^{403/} The Commission has only rarely focused on work assignments.

In Independence, 53 FCC2d at 1166, it warned an AM-FM licensee not to segregate Blacks into jobs at the Black formatted and lower status AM station, and its remedy was to require a job structure analysis. This remedy is commonly used in Title VII cases whenever there is evidence that members of a protected group have been shunted into one type of position to the exclusion of others. This commonly happens to women, who often have little opportunity to rise beyond the glass ceiling level of "administrative assistant" or "researcher" rather than producer. It also commonly happens to minorities, who are frequently excluded from sales or management positions at many stations.

^{404/} Cf. Adelphia, 9 FCC Rcd at 909 ¶3 ("almost all of the Blacks employed in upper-level positions were among the lowest paid upper-level employees at the unit.") In Banks, FCC 85-122, the Commission refused to designate a discrimination issue for trial albeit there was documentary and sworn evidence, including the statements of over twenty witnesses, that Blacks were being paid less than Whites for performing the same work. Banks should be firmly overruled.

^{405/} While Form 396 seeks data on promotions by race and sex, it does not define a "promotion", or distinguish between fulltime and parttime positions. Nor is the Form 396 data on promotions used for enforcement purposes. Indeed, it is seldom made the subject of a Bilingual investigation.

^{406/} The issue of retention sometimes arises incidentally. See, e.g., Walton (Decision), 78 FCC2d at 876 (the only minority person hired during the license term stayed just six weeks).

^{407/} Beaumont, 854 F.2d at 501 involved disproportionate terminations of minorities.

In addition to developing a new zone of reasonableness test for managers and being receptive to allegations going to each element of the EEO Rule, the Commission can respond to the Second Generation issues by fashioning appropriate questions for Bilingual investigations. These questions, which need not be asked in every Bilingual investigation, are appropriately asked of licensees which employ women and minorities but appear to have weak EEO programs. Examples of material which should be sought in a Second Generation Bilingual investigation include:

1. a list of employees by job title, race, sex, length of time in the job, and rate of pay;
2. a log of employees promoted, furloughed or terminated, by job title, race, sex, length of time in the job, and rate of pay;
3. a log of work assignments or duty rosters; and
4. employee handbooks and job descriptions.

Should the Commission conduct site audits (see p. 300 supra), it can also obtain, where appropriate, such additional material as employment applications, test results, test validations studies, performance evaluations and disciplinary notices.

**VII. The Commission Should Conform
Its EEO Forms To The EEO Rule**

If there is any "burden" on broadcasters attendant to EEO enforcement, it arises because there remains some good faith confusion about what the FCC's EEO forms expect of them. By updating Form 395 and Form 396, the Commission can eliminate much of this confusion and thus "reduce burdens on broadcasters." Order. Moreover, cleaner, more consistent and more illuminating EEO compliance reports and data will assist the Commission in appreciating industrywide trends, applying its resources in the most effective way, and ultimately knowing when the EEO program has achieved its objectives and can be ended. See Nondiscrimination - 1969, 18 FCC2d at 243.

A. The Annual Employment Report (Form 395)

**1. The Commission should solve the
problem of superduopoly EEO reporting**

Earlier in these Comments, we demonstrated that owing to the job consolidation flowing from superduopolization, an increase in the station size cap would leave no station with EEO coverage in many markets. See pp. 92-99 supra. Indeed, the trend toward smaller stations and larger headquarters staffs will reduce the number of EEO-covered stations even without an increase in the station size cap.

We noted that one partial solution might be to declare that a superduopoly is a "station" for Form 395 and EEO Rule purposes, and that local headquarters employees also be treated as though they are station employees. See p. 99 supra. However, Form 395 and the EEO Branch's database define a radio station only as an AM

standalone, an FM standalone, or an AM-FM combination, and the database does not recognize employment units of greater size. We have named this the "Duopoly Database Problem." See p. 100 supra.

We have devised a solution to the Duopoly Database Problem: the Commission should include a question on Form 395 asking which other stations are operated by the licensee or program provider in a given MSA or county, and which headquarters operations serve that licensee or program provider in that MSA or county. The Commission should require the filing of complete Form 395 data for each such AM, FM, AM-FM or headquarters operation, irrespective of whether the station or headquarters operation employs five or more persons. No Form 395's would need to be filed if the number of employees at all of the units combined (stations plus headquarters) does not exceed the station size cap (five fulltime employees). Licensees would not be required to file "consolidated" Form 395's.

This solution has four advantages. First, it would not require licensees to absorb an entirely new regimen of Form 395 reporting. Second, members of the public would have accurate and complete EEO data for superduopolies. Third, a licensee could not mask its failure to employ minorities at most of its facilities by hiring them only at one facility (e.g., as on-air staff of an urban station).^{408/} Fourth, the Commission would not need to expend the rather large sum which would otherwise be necessary to restructure its computer system.

^{408/} See Independence, 53 FCC2d at 1166.

2. Using the "Person-Month" as a unit of measurement, the Commission should redesign Form 395 to cover an entire year

The principal deficiency of Form 395 is that it is a two-week "photograph" of a year's employment. Broadcasting is cyclical and the first quarter of the calendar year is slow; thus, many broadcasters do not operate with full staffing during this period. Furthermore, Form 395 does not display the consequences of high job turnover. See Walton (Decision), 78 FCC2d at 876 (indicating that the only minority employee stayed but six weeks on the job). Nor does it reflect whether a parttime person works 30 hours per week (who thus probably influences program diversity) or 10 hours per week (who probably does not influence program diversity). See pp. 193-194 supra.

To solve this problem, the Commission should create a new reporting unit known as a "person-month" -- simply, the fulltime employment of one person for one month. Parttime hires would be treated as fractions of a person-month. Form 395 would be converted into a display of these person-months of data for a calendar year.

A person-month reporting unit would (1) much more accurately reflect the consistency of minority and female employment patterns; (2) eliminate the use of "February hires" (who show up on Form 395 and are promptly thereafter terminated) to give the illusion of long term compliance; (3) prevent stations from placing themselves below the "small station" size cutoff by having large numbers of persons work parttime; (4) eliminate the age-old argument that "if we had only hired one more person we would have been above the zone

of reasonableness", an argument which arises only because of the coarseness of Form 395 as a measuring instrument; and (5) permit the Commission to accurately define a "small station." See p. 194 n. 231 supra (suggesting that a station with fewer than 80 person-months in a given year might be exempted from the affirmative action sections of the EEO Rule).

A "person-month" reporting unit would be among the most effective steps the Commission could take to modernize EEO reporting. Judge Robinson, dissenting in part in Bilingual II, 595 F.2d at 649 n. 92, pointed out that a "person-month" unit would "factor in the length of the employees' stay, the shortness of which might be due to intentional discrimination."409/

409/ The full court held that "[i]t might be wise for the FCC to adopt "person/month" analysis, but this is precisely the type of argument which Congress has instructed petitioners to present in the first instance to the Commission and not to us." Id., 595 F.2d at 631 n. 42.

B. The Model EEO Program Report (Form 396)^{410/}

The data available to the public on Form 396 is woefully subjective and inadequate. It is exceedingly difficult for members of the public to determine which licensees' EEO programs are genuine and which are shams.

As a result, there have been several occasions in which a discriminator passed muster because it concealed its illegal actions in the guise of a safe-looking Form 396. As the Office of Management and Budget observed in 1987, a poorly designed reporting form could permit licensees to "carefully craft responses to be technically true while not revealing their shortcomings in EEO performance." Broadcast EEO - 1987, 2 FCC Rcd at 3968 ¶6.

A few improvements should be made throughout Form 396 are identified below. We outline proposed improvements to specific sections of Form 396 at pp. 328-333 infra.

1. Improvements needed throughout Form 396

1. Commitments reported retrospectively and applied prospectively. Form 396 should ask whether the initiatives reported thereon in the past and present tense will be continued throughout the coming license term, or whether modifications or additions are contemplated. See p. 294 n. 369 supra. Licensees should understand that a renewal application EEO Program, like an assignment application EEO program, is a promise, not just

^{410/} Most of our discussion in this section is directed to the version of Form 396 which is used for renewal applicants. Most of our comments are also germane to the version used for proposed assignees and transferees, particularly our discussion of the distinction between internship programs and "on the job training." See p. 333 infra.

a report.^{411/}

2. Optional affirmative action for the bottom five categories. As we have shown, there is no need for an EEO program directed to secretaries and janitors. See p. 38 *supra*. However, if a licensee wishes to have such a program (*e.g.*, because its personnel operation is structured to permit upward mobility from the bottom five categories into the top four categories) it should not be discouraged from having one.

3. Breakdown of data by race (each minority group), sex, job category and fulltime or parttime status. Form 396, like Form 395, should be structured so that all data is reported by race and sex, and by racial group rather than just aggregated as "minorities." Minorities are not fungible, and animus against one minority group is often specific to that group. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (holding that a remedial minority contracting program was not narrowly tailored when applied to racial groups not shown on the record to have been victimized by discrimination specific to their group). It is particularly important to break down job applicants and job hires by race and sex (rather than just listing raw numbers of minorities and women), since the proportion of minorities and women in the applicant pool and among those hired is a much better indicator of EEO performance than raw numbers, which may mean little in

^{411/} The D.C. Circuit has criticized the Commission for failing to require licensees to remember what they promised in their most recent renewal application. See Tallahassee NAACP v. FCC, 870 F.2d 704 (D.C. Cir. 1989) (noting that licensee "added" a new source for future recruitment -- a source the licensee had promised to use in its previous renewal application but had not actually used).

isolation from the demographic base.^{412/} Furthermore, Form 396 should consistently delineate which information (applicants, hires, promotions) applies to which job categories, and to fulltime and parttime positions. See pp. 255-256 supra. In reporting fulltime or parttime status for promotions, Form 396 should identify whether a promotion is a change in job responsibilities or just a change in hours (e.g. from parttime at 30 hours per week to fulltime at 35 hours per week, which isn't really a promotion at all).

4. Form 396 for Headquarters Units. Form 396 should include information on EEO compliance at a headquarters unit. As we have shown, Form 395 data for headquarters units reflects generally lower representation of minorities and women than the same data for broadcast station employees. See pp. 38-41 supra. One likely reason is that headquarters presently are not required to have EEO programs. However, with the growth of superduopolies, headquarters operations will grow in size at the expense of stations. See 95-96 supra. Thus, it is time to bring headquarters units under the umbrella of EEO protection.^{413/}

^{412/} The racial composition of the applicant pool had to be estimated for the Tennessee Study by assuming that women are about half of the applicant pool. See Exhibit 1 hereto. More accurate numbers could be obtained by identifying how many men applied as well.

^{413/} Headquarters EEO programs are already required for cable. 47 CFR §73.71(c); see Prime Cable, 5 FCC Rcd at 4590. The cable industry has had no difficulty complying with this requirement, and broadcasters should have no difficulty either. To reduce the amount of paperwork involved, we suggest that if (as in the majority of instances) a headquarters unit is situated in the same city as one of the company's stations, the headquarters unit should be permitted to adopt the same EEO program used by its local station.

2. Improvements to §III (Recruitment)

1. Definition of "applicant." The NPRM suggests this definition: an "individual who applies and meets the stated minimum qualifications for a position." Id., 11 FCC Rcd at 5174 ¶44. This definition is partly circular because it does not define "applies...for a job," inviting overbroad station interpretations of an "applicant" which could undermine the EEO Rule. For example, among those whose resumes are included in a package of resumes available at the registration table of a job fair will be many individuals who never intended to "apply" for a job at any specific station, or who seek jobs only in radio or only in television.^{414/} Furthermore, on occasion applicants do not meet "the stated minimum qualifications" but are hired anyway. Thus, we would define an "applicant" as "anyone who is referred, with his or her consent, specifically for possible employment with this station, or who submits a resume to this station as an expression of interest in employment, or fills out this station's job application form, or is interviewed for employment by this station." We would define an "interviewee" as "any applicant who is interviewed for a job by this station." The Commission should either discontinue the use of the term "referral", which includes some non-applicants, or it should define "referral" to be a synonym for "applicant" as defined along the lines above. Applicants should keep records of which applicants were interviewed, in case they are called upon to document their EEO compliance in detail.

^{414/} Recall that a station which receives minority "applications" may thereby immunize itself from a hearing on possible discrimination even if it never hires minorities. See, e.g., Columbus, 7 FCC Rcd at 6359 ¶25.

2. Identification of referral sources. Applicants should identify their referral source contacts and phone numbers on Form 396, much as tower site owners must be identified on Form 301. This simple, cost-free procedure would enable the Commission and the public to independently verify the accuracy of the information provided, and end broadcasters' all too common practice of listing the name of a large national organization (typically NAACP or NOW) in the hope that nobody in the organization could ever attest that no job notices were ever received. This is the single most cost-effective modification to Form 396 the Commission could make.

3. Frequency of use of referral sources. While broadcasters should recruit for each job vacancy, some broadcasters might not wish to notify every source of every job (for example, they might not want to pay to publish every job notice in a national trade publication). To illustrate how often referral sources are contacted, and to underscore the requirement that recruitment must occur for each vacancy, Form 396 should distinguish among (1) referral sources used occasionally; (2) referral sources which have been used for all vacancies; (3) referral sources which will in the future be used occasionally; and (4) referral sources which will in the future be used for all vacancies.

4. Depth of contact with referral sources. The earmark of successful recruitment is personal contact between the station and the referral sources. Impersonal mass mailings look good on paper, but are unlikely to motivate the referral sources (who are volunteers) to take action. Thus, station management personnel should periodically call the referral sources to notify them of openings, and on occasion, the referral sources should be invited

to visit the station, take the station tour, meet the staff, learn which skills are required for which jobs, and develop a feel for what the occupants of various jobs do from day to day.

5. Minority and female sources. Whether or not the Commission's policy in South Carolina Renewals, 5 FCC Rcd at 1709 n. 8 is continued, see pp. 251-252 supra, it is important for the Commission, the public, and the licensee itself to know whether a source is a predominately minority or female organization. That information is not always apparent from the name of the organization. It should be reflected on Form 396.

6. Maintenance of contact with minority and female applicants and employees. At times, minorities and women might apply for a job, and be qualified and well thought of by the station, but the station nonetheless makes a nondiscriminatory choice of someone else for the position. A question on Form 396 might ask whether the licensee maintained contact with these qualified, but initially unsuccessful applicants, apprising them of additional jobs as they arise. A similar question should ask whether the licensee maintained contact with minority and female former employees who leave on good terms, apprising them of job openings in case they know of a colleague who would be interested.

7. Word of mouth recruitment. As we have shown, extensive word of mouth recruitment by a station which is not fully integrated perpetuates the effects of past discrimination by converting the circle of friends of a mostly White male staff into the potential applicant pool. See p. 201 supra. Thus, Section III of Form 396, in asking about referrals from station employees, should identify which referrals came from women and which came from minorities.

3. Improvements to SVI (Available Labor Force)

As discussed at p. 227 supra, licensees should be expected to use current Census data or estimates for this section of Form 396.

4. Improvements to SVII (Complaints)

1. Co-owned stations and headquarters. This section should require applicants to disclose EEO complaints against co-owned stations or headquarters units. See p. 243 supra. Without this information, the Commission and the public cannot determine whether a group owner systematically disregards EEO obligations. This information is critical for enforcement regardless of whether violations at other facilities are viewed as evidence of a pattern or practice meriting enhanced sanctions short of disqualification, or are viewed as evidence of intentional, systematic noncompliance meriting disqualification.

2. Arbitration agreements. Licensees should be asked whether they have placed a binding arbitration agreement into effect. If the Commission holds compulsory binding arbitration agreements to be unlawful, Form 396 should so state. A copy of any voluntary binding arbitration agreement should be submitted as an exhibit to licensees' response to this question, along with a copy of an opinion letter received from the Commission's staff validating the agreement for EEO purposes. See pp. 305-312 supra.

5. Improvements to SVIII (Other Information)

1. All applicants should fill out Section VIII. An application which provides no information in response to Section VIII should be returned as incomplete. By providing no information on Section VIII, an applicant is often attempting to avoid calling attention to itself -- creating the inference that it has something to hide. Such silence is unwise, for it is in this narrative

section that the applicant can potentially be of the greatest assistance to the public and the Commission. Hundreds of petitions to deny have not been filed because licensees' explanations in Section VIII were detailed, forthcoming and candid, demonstrated that the licensee was conscious of deficiencies in its statistical record, and showed that the licensee had proposed and implemented genuine and meaningful proposals to correct those deficiencies. Indeed, citizen groups' ability to render these decisions to forego license challenges is a significant unheralded benefit of the Commission's "efforts-based" approach to EEO.^{415/} See Broadcast EEO - 1987, 2 FCC Rcd at 3974 ¶50. As the UCC I court explained, "[t]he Commission should have discretion to experiment and even to take calculated risks on renewals where a licensee confesses the error of its ways[.]" Id., 359 F.2d at 1008.

2. Minority and female contractors. Information on the use of minority and female entrepreneurs has been required of cable operators since 1985. See 47 CFR §76.76(e)(1). There is no logical reason why cable operators, but not broadcasters, should be expected to develop normal business contacts with minorities and women. The argument that business contacts have nothing to do with equal employment could not be more off the mark, for arms length contacts between equals in the business world are the very heart of the "old boy network" which made the EEO Rule necessary in the first place. Business relationships between broadcasters and minority and female entrepreneurs often lead to shared-interest networking which evolves into increased employment of minorities

^{415/} Many licensees have figured this out. That is one reason why only about half as many petitions to deny are being filed in this radio renewal cycle as in the 1988-1991 radio renewal cycle.

and women by licensees.^{416/} These in turn lead to partnerships and mentoring relationships which ultimately bring minorities and women into ownership. See NPRM, 11 FCC Rcd at 5156 ¶3.

3. Second Generation issues. Section VIII should ask for descriptive information on the "Second Generation" issues in EEO, e.g., work assignments, working environment, promotion, compensation, benefits and termination. See pp. 313-320 supra.

4. Training. Because every new employee must be oriented to her new job, every broadcaster can honestly make the meaningless statement that it "offers on-the-job training." Thus, Form 396 should distinguish between targeted training programs (for students, interns and industry mentees) and "on the job training." Form 396 should also ask whether the trainees are paid minimum wage, and should note in the instructions that stations are not permitted to pay sub-minimum wage or no wages if the "trainees" actually perform only rote functions. See Lou Prato, "Internships: Invaluable experience of slave labor?" Electronic Media, August 19, 1996, p. 1.

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We have designed a "short form" (which we have denoted Form 396-EZ) for very small broadcasters. It incorporates many of the proposals contained above, but does not include those irrelevant to a very small operation. See pp. 349-353 infra.

^{416/} For example, broadcast stations commonly hire salespeople from the ranks of those who sell goods and services to them. This route of entry into sales would be quite valuable, given the low representation of minorities in broadcast sales and the importance of sales experience in one's ability to become a broadcast manager or station owner. See p. 39 supra.

**VII. A Forfeiture Must Provide An
Effective Deterrent To Noncompliance**

**A. EEO forfeitures should be geared to well
established definitions and principles
of sound EEO enforcement practice**

**1. EEO forfeitures should be based on the
well established principle that licensees
should recruit for all vacancies**

Recruitment for each job is the basis for the principal forfeiture calculation performed by the Commission -- and rightly so. See 47 CFR §73.2080(c)(2). It is impossible to have an EEO program which exempts certain jobs from the minority and female recruitment process. See p. 201 supra.^{416/} That is no different from specifying that some jobs are not "suitable" or "feasible" for minorities and women. Rust, 53 FCC2d at 363. The Commission's benchmark for whether a broadcaster has met this most basic requirement is the equivalent of giving a passing grade to someone who scores 66% in an eight-year long final exam. That benchmark could not be more lenient; moreover, like the zone of reasonableness, it should contract with time. See pp. 283-287 supra. We recommend raising it to 80% in two years.

^{416/} When a station does not recruit, it is really using "word of mouth" instead. It has long been established that when the employer is not fully integrated, the use of word of mouth recruitment is a discriminatory employment practice. See, e.g., Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 724 (8th Cir.), cert. denied, 414 U.S. 854 (1973); EEOC Dec. No. 71-2237, 3 FEP Cases 1200, 1201 (1971); see Walton (Decision), 78 FCC2d at 865, 875 ("'word of mouth' referral from a predominately white work force [while] unintended, effectively discriminated against minority group employment"); Triple R. Inc., 42 RR2d 907, 908 (1978) (word of mouth recruitment is a discriminatory practice "where the composition of the workforce remains static in various job categories").

2. **The definition of an "EEO violation" should parallel the Cable EEO Rule, so that each day of noncompliance would figure in the calculation of a forfeiture**

The Commission has never clearly defined a "violation" for the purpose of the application of EEO forfeitures. It is unclear whether a violation is an entire license term of EEO misconduct, a single calendar day of EEO misconduct, or something in between.

Regrettably, the Commission's EEO decisions have referred to the broadcast EEO forfeitures as though a single violation takes a full license term -- several years -- to commit. See, e.g., Lewis Broadcasting Corp., 7 FCC Rcd 1420, 1422 ¶17 (1992). No other type of FCC rule violation is so narrowly or speciously construed.

A cable EEO violation, drawing a \$500 fine, is applicable to a "single day." 47 U.S.C. §554(f)(2) (1996). Like cable systems, broadcasters must implement the EEO rule daily.

A "single day" test is fair and easy to apply. Moreover, it would follow the Commission's practice of harmonizing the broadcast rules with the cable rules, in recognition of the growing convergence, interdependence, and labor-force crossfertilization of these two mass media industries. See EEO Report - 1994, 9 FCC Rcd at 6281 (declaring that "in light of technological convergence, imposing separate and unique EEO requirements on different telecommunications services may no longer be warranted.")^{417/}

^{417/} Commissioner Barrett has written:

I continue to be concerned that when station licensees apply for renewal, their incentive to take EEO violations seriously is not reduced by a lack of Commission commitment to impose the necessary sanctions.

3. **The "period under review" should be defined to include the entire license term**

As we have noted, licensees should not have a "safe harbor" during the first five years of a license term. See pp. 292-293 supra. That is why a Bilingual investigation should cover the

417/ (continued from p. 335)

The Commission has not imposed EEO fines based on day-to-day violations, as we do in areas such as tower violations or indecency. 1/ Without utilizing short-term renewal sanctions in combination with serious fine levels, I believe stations could calculate the minimal cost of EEO violations relative to other per-day violations, and integrate that calculation into the sales price of a station at the time of assignment. Since EEO fines will not approach the \$250,000 maximum sanction authorized for broadcasters in other areas, EEO fines alone will continue to be a mere decimal point in the overall value of any station transaction. 2/

1/ See Separate Statement of Commissioner Andrew C. Barrett, RE: Applications of Cook Inlet Radio License Partnership, L.P. and Infinity Broadcasting [NAL imposing \$600,000 sanction against Infinity Broadcasting for indecency violations], December 18, 1992.

2/ In the context of a station assignment, transactions that constitute several million dollars [or even several hundred thousand dollars] are not likely to be affected by an EEO sanction of \$20-30,000. Yet, the net effect of EEO violations can have more serious impacts on people's lives than other FCC violations.

Edens Broadcasting, Inc., 8 FCC Rcd 4905, 4907 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part/Dissenting in Part).

entire license term, and it is also why the fruits of that investigation should yield sanctions which also cover the entire license term.

**4. The forfeiture guidelines should address the
 Second Generation issues in EEO enforcement**

The forfeiture guidelines proposed in the NPRM focus only on recruitment. These guidelines should be restructured to advance the Second Generation goals of the EEO Rule, such as retention and advancement. See pp. 313-320 supra. An EEO regulatory initiative aimed at the Second Generation issues cannot succeed without the willingness to impose forfeitures in appropriate cases.

**5. The forfeiture schedule should be
 indexed annually to the inflation rate**

It may be several years before the Commission has occasion to review its EEO Rules again. It should anticipate the need to ensure that the weight of its forfeitures is not diminished by the time value of money. Consequently, the Commission should follow the approach it has followed with processing fees by automatically linking each dollar amount in its forfeiture schedule (base amount, aggravating and mitigating factors) to the Consumer Price Index-Urban ("CPI-U"). See FCC To Increase Processing Fees, FCC News Release, August 8, 1996.

**6. The base forfeiture for EEO should
 reflect the relative importance of EEO
 in our system of broadcast regulation**

MMTC's study, "FCC EEO Forfeitures, 1990 - 1996" (Exhibit 2 hereto) concluded that the critical issue in any discussion of EEO forfeitures is the base amount, given the evenness of the bell-shaped curve distribution of forfeitures, the absence of any favoritism given to particular types of stations, and the lack of